Filed 10/13/09 In re A.F. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re A.F., a Person Coming Under the Juvenile Court Law.	B213551 (Los Angeles County Super. Ct. No. CK54870)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JENNIFER F., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Donna Levin, Juvenile Court Referee. Affirmed.

Nancy Rabin Brucker, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the Los Angeles County Counsel, James M. Owens, Assistant County Counsel, William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

Jennifer F., the mother of 11-year-old A.F., appeals from the juvenile court's January 9, 2009 orders summarily denying her two post-guardianship petitions for modification seeking additional and unmonitored visitation with A.F. (Welf. & Inst. Code, § 388.)[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Summary of Dependency Proceedings for A.F.*

a. *Dependency jurisdiction*

This case has a long and extensive history in the juvenile court. In May 2004 the court sustained a section 300 petition filed by the Los Angeles County Department of Children and Family Services (Department), finding Jennifer F. had engaged in physical and verbal altercations with her parents in A.F.'s presence, used inappropriate verbal discipline, provided meals inconsistently to A.F. and overall demonstrated inconsistent parenting ability, placing A.F. at risk of substantial harm (§ 300, subd. (b)). The court also sustained allegations that A.F. was suffering from serious emotional damage as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior as a result of Jennifer F.'s conduct (§ 300, subd. (c)). At disposition the court ordered A.F. placed with his maternal grandfather and ordered family reunification services for Jennifer F.

b. *Failure of reunification*

Initially, during the family reunification period, Jennifer F. was allowed unmonitored visitation with A.F. In September 2005, following a contested 12-month review hearing (§ 366.21, subd. (f)), however, the juvenile court ordered monitored visitation based on Department reports that Jennifer F. had routinely used her visits to disparage her father (A.F.'s maternal grandfather) and to discourage or prevent A.F. from taking his prescribed psychotropic medication in connection with his diagnosis of attention deficit hyperactivity disorder and oppositional defiance disorder.

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1 Statutory references are to the Welfare and Institutions Code.

During the September 2005 hearing, the court also terminated family reunification services. The court concluded, although Jennifer F. had completed court-ordered parenting classes and was actively participating in therapy sessions with a psychologist, she had not made substantial progress. The court ordered comprehensive social services (frequently referred to by the juvenile dependency bench and bar as "wraparound services")[2] to support A.F.'s placement with his grandfather and the court's visitation orders and set a date for the selection and implementation hearing. Guardianship was identified as the proposed permanent plan.

c. *Appointment of A.F.'s maternal grandfather as legal guardian*

In December 2005 at the uncontested selection and implementation hearing (§ 366.26), the court appointed A.F.'s maternal grandfather as his legal guardian. Acknowledging the importance to A.F. of continued contact with his mother, the court allowed Jennifer F. weekly monitored visitation in the presence of a Department-approved monitor. The court found exceptional circumstances warranted continuance of its jurisdiction and informed the parties it would conduct post-permanency planning hearings at regular intervals to review A.F.'s status.

d. *Post-permanency planning review hearings*

At the first post-permanency planning review hearing on March 22, 2006, Jennifer F. objected to the court's order requiring monitored visitation. The court continued the matter to conduct a contested (evidentiary) hearing. At that hearing (conducted over two days in June and July 2006), the independent child services specialist who had monitored Jennifer F.'s visits testified, while Jennifer F.'s parenting and communication skills had slightly improved, he would still give her an "overall [letter] grade of C minus or D." Jennifer F. had difficulty refraining from making disparaging comments during her visits about A.F.'s guardian and A.F.'s medical

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2 The order requiring comprehensive social services included "respite babysitting for grandfather, as well as monitoring mother's visitation and to assist and instruct mother regarding how to appropriately and effectively provide structure and support for [A.F.] to achieve academically and socially. . . ."

treatment. In addition, on June 5, 2006 Jennifer F. had disrupted an Individualized Education Program (IEP) meeting regarding A.F., storming out of the meeting at A.F.'s school and interrogating a young student who had reported some of A.F.'s behavior. A.F. appeared agitated and embarrassed. Although the court also heard testimony from Jennifer F.'s psychotherapist that Jennifer F.'s psychological well-being was improving, the court concluded, in light of Jennifer F.'s impulse control issues and her lack of substantial progress, monitored visitation would best ensure A.F.'s continued stability.

At the next review hearing on January 18, 2007, Jennifer F. once again sought to increase visitation and eliminate the requirement of a monitor. Instead, the court ordered more limited, monitored visitation (once a week) based primarily on the recommendation of A.F.'s treating psychologist who reported, A.F. "does continue to struggle with issues related to his Mother, still trying to reconcile the confusing and unpleasant behavior (which he too has now begun to report, e.g.: negative comments she will make about his loved ones, etc.) while visiting with her, with his feelings of affection for her." The therapist recommended that "visits remain limited and monitored to maintain [A.F.]'s emotional well-being and also to ensure the primary parent/child relationship ([A.F.] and Grandfather) is not undermined."

In April 2007, following the termination of wraparound services, Jennifer F. advised the court she could not afford to pay a professional monitor. The Department reported that Jennifer F. had designated several persons to act as proposed monitors, whom it approved, only to have those monitors withdraw once they spoke to the Department and learned that A.F.'s stability (rather than family reunification) was the objective. The court reiterated its prior orders and told the parties it would review the matter at the next scheduled post-permanency planning review hearing.

In July 2007, at the next scheduled post-permanency planning review hearing, the court terminated its jurisdiction. As to visitation, the order stated: "Mother may have weekly monitored visits with the monitor consistent with the arrangements of the legal

guardian/grandfather. Monitored visits with the mother and the minor may be monitored by any monitor agreed to by the legal guardian/grandfather."

3. *Jennifer F.'s Appeal of the Termination Order*

Jennifer F. appealed from the court's order terminating its jurisdiction. In March 2008 we reversed the court's July 2007 order to the extent it conferred unfettered discretion on the legal guardian to terminate visitation and (as the Department conceded) was insufficiently specific with respect to the duration of the visits. (*In re A*[.]*F.* (Mar. 17, 2008, B199934) [nonpub. opn.].)

4. *The Juvenile Court's Order on Remand Terminating Its Jurisdiction*

On June 9, 2008, following the filing of our remittitur in case number B199934, the juvenile court issued an order again terminating its jurisdiction. As to visitation, the court ordered monitored visitation one time per week (on Saturday or Sunday) from 4:00 p.m. to 6:00 p.m. During that hearing, Jennifer F. again requested unmonitored visitation. Jennifer F. also informed the court she could not afford the cost of a private monitor. The court explained the hearing was for a limited purpose (to specify the duration of visitation) and informed Jennifer F. that if she wanted to change the nature of the visitation, she would have to file a section 388 motion.[3]

5. *Jennifer F.'s Section 388 Petitions and the Court's Ruling*

On December 29, 2008 Jennifer F. filed two section 388 petitions requesting the court to modify its June 9, 2008 order. One petition sought unmonitored visitation and overnight visitation, citing the positive interactions between Jennifer F. and A.F. since the court initially terminated its jurisdiction in July 2007. That petition was supported by several letters from employees of professional babysitting agencies who had monitored

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3 Jennifer F. filed a notice of appeal from the juvenile court's June 2008 order. After her counsel was unable to identify any arguable issues and Jennifer F. failed (after being informed of her right to submit any contentions she felt the court should consider) to raise any claim of error or defect, the appeal was dismissed as abandoned in accordance with *In re Sade C.* (1996) 13 Cal.4th 952, 994. (*In re A.F.* (Nov. 20, 2008, B209691) [nonpub. opn.].)

Jennifer F.'s visits and described her interactions with A.F. as appropriate and positive. The petition also included a declaration from Jennifer F. that the cost of a professional monitor was at least $25 per hour ($50 a visit), an amount she could not consistently afford. Jennifer F. explained she was a part-time student taking paralegal classes and receiving financial aid. (She did not include any details concerning her employment or income.)

In another section 388 petition, filed the same day, Jennifer F. sought, in addition to unmonitored and overnight visits, orders allowing A.F. to attend church services and church-affiliated activities with her. She also requested reinstatement of family reunification services and family maintenance services, as well as orders compelling A.F.'s attendance at court hearings. This petition was supported, in part, by several photographs depicting A.F. smiling while in his mother's care and a March 2006 letter from Jennifer F.'s then treating psychotherapist, who wrote to the Department detailing Jennifer F.'s progress in therapy. Jennifer F. also included her own declarations attesting that, on three occasions during the winter holidays (November 29, 2008, December 8, 2008 and December 26, 2008), she had left telephone messages for A.F.'s legal guardian advising him she was unable to procure a monitor and requesting the guardian serve as monitor. On each of those occasions A.F.'s guardian did not call her back and no visit took place on those dates.

The juvenile court summarily denied both petitions on the ground Jennifer F. had not made a prima facie showing the requested changes in the court's orders would be in A.F.'s best interests.

DISCUSSION

1. *Governing Law and Standard of Review*

Section 388 provides for modification of prior juvenile court orders when the moving party can demonstrate new evidence or a change of circumstances and modification of the previous order is in the child's best interest. (*In re Aaliyah R.* (2006)

136 Cal.App.4th 437, 446; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526.)[4] "The parent seeking modification must 'make a prima facie showing to trigger the right to proceed by way of a full hearing.'" (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

The required prima facie showing has two elements: The parent must demonstrate (1) a genuine, significant and substantial change of circumstances or new evidence and (2) revoking the previous order would be in the best interests of the child. (*In re Anthony W., supra,* 87 Cal.App.4th at p. 250.) That is, "the petition must allege a change of circumstance or new evidence that requires changing the existing order." (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) "It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child." (*In re Kimberly F., supra,* 56 Cal.App.4th at p. 529.)

"The petition [is] liberally construed in favor of its sufficiency." (*In re Daijah T., supra*, 83 Cal.App.4th at p. 672.) To be entitled to a hearing, the petitioner "need[] only . . . show 'probable cause'; [the petitioner is] not required to establish a probability of prevailing on [the] petition." (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432-433.) Nonetheless, if the allegations fail to show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806-807 ["the hearing is only to be held if it appears that the best interests of the child may be promoted by the proposed change of order"]; cf. *In re Edward H.* (1996) 43 Cal.App.4th 584, 593 ["'prima facie' showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited"].)

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4 Section 388 provides a parent or other interested party "may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made . . . . [¶] . . . [¶] If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held. . . ."

We review the juvenile court's summary denial of a section 388 petition for abuse of discretion. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 460; *In re Anthony W., supra*, 87 Cal.App.4th at p. 250.)

2. *The Juvenile Court Did Not Abuse Its Discretion in Denying Jennifer F.'s Section 388 Petitions*

Jennifer F. contends the court erred in denying her section 388 petitions because it mistakenly believed it lacked jurisdiction to consider them. She relies on the following oral statement by the court, made on the record but without any counsel or parties present: "The mother filed a [section] 388 in this matter. The original matter was originally terminated with kingap in a legal guardianship for [A.F.] on July 19, 2007. The legal guardian then filed a 388 on June 9, 2008 which was later withdrawn on July 30, 2008. So the court no longer has jurisdiction in this matter and I will not open jurisdiction for the purpose of the 388, and the mother has filed several appeals on this case which either have been abandoned or rulings were affirmed, so I am not reopening this case. Jurisdiction was previously terminated. We will keep it that way. I am denying the 388."

Jennifer F.'s characterization of the court's order denying her section 388 petitions is incorrect. Contrary to Jennifer F.'s contention, the juvenile court did not believe it lacked jurisdiction to consider the section 388 motions.[5] In summarily denying the petitions, the court concluded, as stated in its signed order, that Jennifer F. had not made a prima facie case that changing the visitation order would in any way be in A.F.'s best

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5 The juvenile court plainly had the ability to reopen jurisdiction to consider the section 388 motion. (See § 366.4 ["[a]ny minor for whom a guardianship has been established resulting from the selection or implementation of a permanency plan pursuant to Section 366.26 is within the jurisdiction of the juvenile court"]; *In re D.R.* (2007) 155 Cal.App.4th 480, 486-487 ["even though the juvenile court terminates dependency jurisdiction in a case, the juvenile court still retains jurisdiction over the guardianship [pursuant to § 366.4] and any motions relating to that guardianship may properly be filed in the juvenile court"].)

interest. For that reason, the court found no basis for reasserting its jurisdiction in the matter and holding a hearing on the section 388 petitions.

Jennifer F. insists her petitions did present a prima facie case for modifying the existing visitation orders. According to Jennifer F., she not only demonstrated a change of circumstances (her positive interactions with A.F. since July 2007), but also satisfied the best-interests prong by explaining that her inability to afford professional monitors would result in fewer visits with A.F. and undermine his emotional stability absent the requested change. The record does not support Jennifer F.'s argument.

The juvenile court restricted Jennifer F.'s visitation based largely on a report from A.F.'s therapist that limiting visitation to once a week in a monitored setting was essential for maintaining A.F.'s mental health and stability. Nothing in Jennifer F.'s petitions seeking modification of that order challenges the continued validity of that assessment. Her positive interactions with A.F. during her once-a-week visits are, by themselves, insufficient to show that additional or unmonitored visitation is in A.F.'s best interests. (See *In re Jasmon O.* (1994) 8 Cal.4th 398, 420 [after family reunification services have been terminated, focus of dependency court is on child's need for stability, not parent's desire for additional interaction]; *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

Although Jennifer F. complains in her section 388 petitions (as she has in every other proceeding since wraparound services terminated) about the cost of a professional monitor, the court's visitation order made in conjunction with its order terminating jurisdiction does not require professional monitors; and Jennifer F. has made no showing of her systemic inability to procure unpaid or volunteer monitors. Moreover, even if Jennifer F. could demonstrate both that professional monitors were the only feasible alternative under the circumstances and that the cost of such monitors was prohibitive (a showing she did not make), the remedy, in light of findings that monitored visitation is necessary to protect A.F., would certainly not be elimination of the monitoring requirement.

Jennifer F.'s reliance on *In re Hashem H.* (1996) 45 Cal.App.4th 1791 (*Hashem H.*) to support her entitlement to a hearing on her section 388 petitions is misplaced. In *Hashem H.*, a mother lost custody of her son in dependency proceedings because of her psychological problems and resulting inability to care for him. Just prior to the selection and implementation hearing, mother filed a section 388 petition seeking custody, alleging as changed circumstances her participation and progress in individual and conjoint counseling and sustained employment. The juvenile court summarily denied the petition, explaining mother's petition showed only her participation in therapy, not successful *completion* of psychotherapy. The Court of Appeal reversed, holding it was error to deny a hearing when there was evidence that the problems that had led to the child's removal had been resolved. (*Id.* at pp. 1796-1797.)

The focus of the inquiry in *Hashem H.* was entirely on whether the mother had demonstrated sufficient changed circumstances. (See *Hashem H., supra,* 45 Cal.App.4th at p. 1800 ["A fair reading of the petition indicates that appellant's mental and emotional problems which led to the removal of Hashem from her home had been successfully resolved through therapy. Appellant's petition made out a prima facie case of changed circumstances."].) Here, in contrast, the denial of the section 388 petitions was not based on the inadequacy of allegations showing a change of circumstances, but on the lack of sufficient allegations that additional and unmonitored visitation was in A.F.'s best interests. (See *In re Zachary G.* (1999) 77 Cal.App.4th 799, 808 ["*Hashem H.* is distinguishable because, unlike the present case, there was no contention [in that case] either at the trial level or on appeal that the proposed change of custody from the legal guardians back to the mother was not in the child's best interests"].)

Equally specious is Jennifer's assertion the March 9, 2006 letter from her psychotherapist to A.F.'s social worker detailing Jennifer's progress resembles the evidence the Court of Appeal found persuasive in *Hashem H.* The letter is neither new evidence nor reflective of a change in circumstances. The juvenile court considered that letter prior to its termination orders (as well as the therapist's subsequent testimony at the

contested post-permanency planning hearing) and concluded Jennifer's progress, as detailed by her therapist, was insufficient to demonstrate that unmonitored visitation was in A.F.'s best interests, particularly in light of contrary evidence by A.F.'s own psychotherapist. Moreover, while the letter details Jennifer F.'s progress and opines on her commitment to her son, it does not address (in contrast to the therapist letter supporting the section 388 petition in *Hashem H.*) the question whether unmonitored and additional visitation would be in A.F.'s best interests. In sum, the letter satisfies neither the change-of-circumstances requirement nor the best-interests requirement for a section 388 hearing.

Finally, although one of Jennifer F.'s section 388 petitions is directed to matters other than visitation, including requests for reinstatement of family reunification services and family maintenance services, as well as orders allowing A.F. to attend church services with her and compelling joint counseling or mediation to facilitate more positive communication between Jennifer F. and A.F.'s legal guardian, her appellate brief (and thus our opinion) addresses only her request for modification of the court's visitation orders. (See *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [it is not appellate court's function to address arguments not raised on appeal]; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466 [appellate review limited to issues that have been adequately raised and supported in appellant's brief].)

DISPOSITION

The January 9, 2009 orders summarily denying Jennifer F.'s section 388 petitions for modification are affirmed.

PERLUSS, P. J.

We concur:

WOODS, J. JACKSON, J.